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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

No. 725

VANCE JULIAN, TRUSTEE IN BANKRUPTCY OF ROBY C. WOODY, d/b/a WOODY MOTOR COMPANY, BANKRUPT,
Petitioner,

vs.

THE FARMERS BANK OF CLINTON, MISSOURI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner Vance Julian, Trustee in Bankruptcy of Roby C. Woody, d/b/a Woody Motor Company, Bankrupt, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit rendered in appeal numbered

18588 wherein The Farmers Bank of Clinton, Missouri, was Appellant and petitioner here was Appellee, which judgment reversed in part, modified and remanded for further proceedings consistent with its opinion, the judgment of the United States District Court for the Western District of Missouri which affirmed the order of the Referee in Bankruptcy.

The Certified Transcript of Record (Volumes I, II and III) for use in the Supreme Court of the United States on Application for Writ of Certiorari, forwarded to the Clerk of this court on September 18, 1967, is referenced infra thus (Vol. ....., Tr. .....).

OPINIONS BELOW

The Referee's Order On Trustee's Objections To Allowance Of Claim Of Farmers Bank And On Petition For Order To Show Cause Directed To Said Bank, filed June 10, 1964 (set out in Vol. I, Tr. 65-71) is appended hereto as Appendix A (pp. A54 to A62); the District Court's Memorandum Opinion And Decision On Four Petitions For Review, filed January 5, 1966 (set out in Vol. II, Tr. 16-40) is appended hereto as Appendix A (pp. A28 to A53); the Opinion and Judgment of the Court of Appeals dated August 8, 1967 (set out in Vol. III, Tr. 61-89) has not been officially reported and a copy is appended hereto as Appendix A (pp. A1 to A27).

JURISDICTION

The judgment of the Court of Appeals was entered on August 8, 1967 (Vol. III, Tr. 89). Petition For Rehearing or In The Alternature To Transfer To The Court En

Banc, filed August 22, 1967 (Vol. III, Tr. 90-104), was denied by the Court of Appeals on September 5, 1967 (Vol. III, Tr. 105). Appellee's Motion To Stay Issuance Of Mandate was granted and issuance of mandate stayed for a period of 30 days from and after September 11, 1967 (Vol. III, Tr. 106). This court's jurisdiction is invoked under 28 U.S.C.A. Section 1254 and 11 U.S.C.A. Section 47.

QUESTIONS PRESENTED

1(a). Did the Court of Appeals err and misapply the *clearly erroneous* rule stated in *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395, which it used as the Standard Of Review (Court of Appeals opinion pp. 7, 8; Vol. III, Tr. 61-88; Appendix A, pp. A7-A8) in the instant case when it denied Appellee's Motion To Vacate Setting (Vol. III, Tr. 1-59) and declined to hold the instant appeal until the *entire evidence* presented at the joint hearing and considered by the Referee and the District Court could also be presented to and considered by the Court of Appeals as stated and supported in said motion?

(b) Can the Court of Appeals by applying and using the *clearly erroneous* rule stated in the *Gypsum* case to *less than the entire evidence*, as the Standard Of Review, displace the Referee whose duty it is to hear the testimony, observe the witnesses, weigh the evidence and find the ultimate facts accordingly and can it disregard: General Order in Bankruptcy No. 47 (11 U.S.C.A. following Sec. 53), Federal Rule Of Civil Procedure No. 52a (28 U.S.C.A. Supp.) and cases cited infra; and the provisions of Sections 60a, b and c, 67 (6) and (7) and 70 a and c, paragraphs 1 and 2 of the Bankruptcy Act (11 U.S.C.A. 96, 107,

110), and Section 443.460, Vernon's Annotated Missouri Statutes and cases cited infra?

2(a). With respect to the November 22, 1957, mortgage (Vol. I, Tr. 28, 29) discussed in Court of Appeals opinion (Vol. III, Tr. 62, 63, 69-74; Appendix A, pp. A2-A3, A9-A14) did the Court of Appeals err in ruling that oral agreements made between the parties prior to bankruptcy bound the trustee *after* the advent of bankruptcy?

(b) Did appellant by its conduct in permitting said mortgage to remain past due and lie dormant without enforcing the terms thereof and without timely asserting its mortgage lien, from May 22, 1958, before bankruptcy, until January 19, 1960, *after* bankruptcy actually subordinate itself and was the Referee justified in subordinating appellant's mortgage and rights to the rights of creditors under the facts stated infra?

(c) Has appellant preserved any recognizable rights or liens to after-acquired property acquired when expanding and making replacements under Section 60 a(6) of the Bankruptcy Act (11 U.S.C.A. Sec. 96)?

(d) Has appellant waived its mortgage lien and was it estopped to claim a mortgage lien by its conduct and by its consent to the sale of bankrupt's property free and clear of liens without having secured the order of the Referee, or the United States District Court, transferring said lien rights, if any, to the fund realized from the sale under the facts stated infra?

3. With respect to the May and June, 1959 mortgage loans (Vol. I, Tr. 31, 34):

(a) Can appellant reap benefit from its own fraudulent conduct in agreeing to hold secret and not file said mortgages as required by Section 443.460 of the Missouri

Statutes by *electing* to credit the June 30, 1959, setoff of $9,733.88 as a payment on said fraudulent mortgages in which appellant itself participated?

(b) When on the night of June 30, 1959 (the day of said setoff), bankrupt, just to help appellant bank, voluntarily gave appellant a chattel mortgage on 15 of his free and clear cars without consideration to cover the unpaid balance of the June, 1959 mortgage loan, which mortgage was dated July 1 and filed July 2, 1959 (Vol. I, Tr. 39, 40), and when several days thereafter, on July 4, a holiday, or on July 5, Sunday, after business hours between 6 p. m. and midnight, appellant was permitted to enter and remove said 15 cars from bankrupt's premises, by such conduct, subsequent to the June 30, 1959 setoff of $9,733.88, did bankrupt and appellant characterize and reflect the animus which prompted said setoff and show and establish the original purpose of fraud beginning with and incident to (a) the obtaining of said May and June, 1959 unfiled mortgages, (b) the taking of the $9,733.88 set-off, and (c) the voluntary giving of said July 1, 1959 mortgage on 15 free and clear cars?

(c) Can the Court of Appeals rule that Appellant had no *reasonable* cause to believe bankrupt was insolvent, merely from Appellant's testimony that it relied on bankrupt's false financial statement in the face of appellant's agreements to keep said mortgages secret and to withhold the same from record in fraud of the rights of creditors and in violation of Section 443.460 of Missouri state law, or was appellant put upon inquiry by these and other facts stated infra and thereby bound by what it would have discovered upon inquiry and thus appellant had the *reasonable cause*, as ruled by the Referee and affirmed by the District Court, under Section 60(b) of the Bankruptcy Act?

(d) Did the Court of Appeals err in ruling that appellant could set off the amount due it under said fraudulent and void mortgage loans against the voidable preferences which appellant received from bankrupt contrary to Section 60(c) of the Bankruptcy Act?

STATUTES AND RULES INVOLVED

General Order in Bankruptcy No. 47 (11 U.S.C.A. following Sec. 53)—Reports of Referees and Special Masters, provides:

> "Unless otherwise directed in the order of reference the report of the referee * * * shall set forth his findings of fact and conclusion of law, and the judge shall accept his finding of fact unless clearly erroneous."

General Order in Bankruptcy No. 37 (11 U.S.C.A. following Sec. 53)—General Provisions, provides:

> "In proceedings under the Act the Rules of Civil Procedure for the District Courts of the United States shall in so far as they are not inconsistent with the Act or with these general orders, be followed as near as may be."

Federal Rules of Civil Procedure, Rule 52a (28 U.S.C.A. Supp.)—Findings by the Court, provides:

> "In all actions tried upon facts without a jury * * *, the court shall find the facts specially and state separately its conclusions of law thereon and judgment shall be entered pursuant to Rule 58; * * *. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Section 60 of the Bankruptcy Act (11 U.S.C.A. 96 Supp.) —Preferred Creditors, provides:

Section (a):

"(1) A preference is a transfer, as defined in this title, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this title, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other of the same class."

"(2) For the purpose of subdivisions (a) and (b) of this section a transfer of property other than real property shall be deemed to have been made or suffered at the time it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could be superior to the rights of the transferee. * * *"

"(3) The provisions of paragraph (2) of this subsection shall apply whether or not there are or were creditors who might have obtained such liens upon the property other than real property transferred * * *."

"(6) The recognition of equitable liens where available means of perfecting legal liens have not been employed is declared to be contrary to the policy of this section. If a transfer is for security and if (A) applicable law requires a signed and delivered writing, or a delivery of possession, or a filing or recording, or other like overt action as a condition to its full validity against third persons other than a buyer in the ordinary course of trade claiming through or under the transferor and (B) such overt act has not been taken, and (C) such transfer results in the acquisition of only an equitable lien, then such transfer is not perfected within the meaning of paragraph (2)

of this subsection. Notwithstanding the first sentence of paragraph (2) of this subsection, it shall not suffice to perfect a transfer which creates an equitable lien as such is described in the first sentence of this paragraph, that it is made for a valuable consideration and that both parties intend to perfect it and that they take action sufficient to effect a transfer as against liens by legal or equitable proceedings on a simple contract * * * *And provided further,* that nothing in this paragraph shall be construed to be contrary to the provisions of paragraph (7) of this subsection."

"(7) Any provision in this subsection a to the contrary notwithstanding if the applicable law requires a transfer of property other than real property for or on account of a new or contemporaneous consideration to be perfected by recording delivery or otherwise, in order that no lien described in paragraph (2) of this subsection could become superior to the rights of the transferee therein, * * * the time of transfer shall be determined by the following rules: * * *

"II. * * * if such compliance is not had prior to the filing of the petition initiating a proceeding under this title, such transfer shall be deemed to have been made or suffered immediately before the filing of such petition."

Section (b)

"Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that debtor is insolvent."

Section (c)

"If a creditor has been preferred and afterward in good faith gives the debtor further credit without security of any kind for property which becomes a part

of the debtor's estate, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him."

Section 67 of the Bankruptcy Act (11 U.S.C.A., Sec. 107)—Liens and fraudulent transfers, provides:

Section (*d*) (*6*)

"A transfer made or an obligation incurred by a debtor adjudged a bankrupt under this title, which is fraudulent under this subdivision against creditors of such debtor having claims provable under this title, shall be null and void against the trustee, except as to a bona fide purchaser, lienor, or obligee for a present fair equivalent value * * *.

Section (*d*) (*7*)

"Nothing contained in this subdivision d shall be construed to validate a transfer which is voidable under section 96 of this title.

Section 70 of the Bankruptcy Act (11 U.S.C.A., Sec. 110)—Title to Property, provides:

"(a) The trustee of the estate of a bankrupt * * * upon his * * * appointment * * * and qualification shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title, * * * to all of the following kinds of property wherever located * * * (4) property transferred by him in fraud of creditors; * * *."

"(c) * * * The trustee shall have as of the date of bankruptcy the rights and powers of: (1) a creditor who obtained a judgment against the bankrupt upon the date of bankruptcy, whether or no such creditor exists, (2) a creditor who upon the date of bankruptcy obtained an execution returned unsatisfied

against bankrupt, whether or not such a creditor exists, and (3) a creditor who upon the date of bankruptcy obtained a lien by legal or equitable proceedings upon all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt upon a simple contract could have obtained such a lien, whether or not such a creditor exists."

* * *

"(e) (1) A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this title which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this title, shall be null and void as against the trustee of such debtor."

"(2) All property of the debtor affected by such transfer shall be and remain a part of his assets and estate, discharged and released from such transfer and shall pass to, and every such transfer or obligation shall be avoided by, the trustee for the benefit of the estate * * *. The trustee shall reclaim and recover such property or collect its value from and avoid such transfer or obligation against whoever may hold or have received it * * *."

Section 443.460, Vernon's Ann. Missouri Statutes—Mortgages, etc., of personalty, invalid unless recorded— provides:

"No mortgage or deed of trust of personal property hereafter made shall be valid against any other person than the parties thereto, unless possession of the mortgaged or trust property be delivered to and retained by the mortgagee or trustee or *cestui que* trust or unless the mortgage or deed of trust be acknowledged or proved and recorded in the county in which the mortgagor or grantor resides, in such manner as conveyances of land are by law directed to be acknowledged or proved and recorded, or unless the mortgage

or deed of trust, or a true copy thereof, shall be filed in the office of the recorder of deeds of the county where the mortgagor or grantor executing the same resides, * * *; and such recorder shall endorse on such instrument or copy the time of receiving the same, and shall keep the same in his office for inspection of all persons; and such mortgage or deed of trust, or copy thereof, may be so filed, although not acknowledged, and shall be as valid as though the instrument were fully spread upon the records of the county * * *; and such instrument, when acknowledged and recorded, or when the same or a copy thereof, shall have been filed, as above provided, shall thenceforth be notice of the contents thereof to all the world."

STATEMENT

1. Roby C. Woody, d/b/a Woody Motor Company, was adjudicated a bankrupt on July 14, 1959; petitioner Vance Julian became trustee of bankrupt's estate on September 29, 1959 (Vol. I, Tr. 1-6).

2. On January 19, 1960, appellant filed proof of claim for $6,000.00, as a secured creditor, under note and chattel mortgage dated November 22, 1957 (Vol. I, Tr. 15-17) in which the described security consisted chiefly of tools, machinery, equipment, shop furniture and fixtures * * * "now owned, or hereafter purchased during the life of this loan" * * * and "the increase thereof." (Vol. I, Tr. 28). On October 10, 1960, the trustee filed objections to the allowance of said claim and instituted turn-over proceeding against appellant (Vol. I, Tr. 17-22).

3. Concurrently with the turn-over proceedings against appellant, the trustee also filed turn-over proceedings against The First National Bank of Clinton, which with appellant were "local" banks, against 17 "local" people, and against Commercial Credit Corporation (called

C.C.C.). On May 28, 1964, the Referee entered turn-over orders directed to said "local" people and to C.C.C.; on June 10, 1964, the Referee entered turn-over orders directed to said "local" banks (Vol. I, Tr. 88).

4. On June 30, 1964, C.C.C. filed petition to review the turn-over order against it and on August 10, 1964, said "local" people and "local" banks filed petitions to review the respective turnover orders against them. On September 8, 1964, the Referee certified said four reviews to the United States District Court (Vol. I, Tr. 88).

5. On January 5, 1966, the District Court rendered its Memorandum Opinion and Decision on Four Petitions for Review (Vol. I, Tr. 16-39; Appendix A, pp. A29-A53) which confirmed the Referee with respect to his rulings against said "local" people and said "local" banks (Vol. II, Tr. pp. 16-25; Appendix A, pp. A35-A38), but recommitted the proceedings against C.C.C. to the Referee for compliance with Eighth Circuit rule which requires the Referee's findings of fact and conclusions of law to be set out in the Referee's order and not in the Referee's certificate on review (Memorandum Opinion and Decision, Part IV, Vol. II, Tr. pp. 25-39; Appendix A, pp. A39-A53).

6. The four turn-over proceedings were directed to bankrupt's action in diverting all of his assets away from his creditors at approximately the same time on the eve of bankruptcy to said "local" people, said "local" banks and to C.C.C. which action and the resultant turn-over proceedings were the subject of the joint hearing before the Referee on March 30, 1964, where all evidence common to all such transferees was applied to each to the extent applicable to each without the necessity of repetition. The largest part of the evidence presented at said joint hearing was presented in the C.C.C. turn-over proceedings which resulted in the Referee's order directing

C.C.C. to turn-over in excess of $100,000 to the Trustee. Appellee's Motion to Vacate Setting in the instant cause was directed to causing all evidence common to all such transferees to be considered by the Court of Appeals (Vol. III, Tr. 1-60). The parts of the C.C.C.'s evidence which are common and applicable to the instant case were not presented to the Court of Appeals.

7. On November 22, 1957, appellant made a $16,000.00 loan to bankrupt. To evidence and secure said loan, bankrupt gave appellant a Note and Chattel Mortgage which was filed for record on November 23, 1957; said mortgage loan became due on May 22, 1958 (Vol. I, Tr. 28, 29), at which time the unpaid balance thereon was $11,000.00. By oral agreement with appellant bankrupt made subsequent payments thereon until May 7, 1959, at which time the unpaid balance was $6,000.00 (Vol. I, Tr. 29, 23). No extension was endorsed on the note and no written extension agreement was made. When bankrupt stopped making payments on May 7, 1959, he told appellant "I couldn't meet the obligation and *we had others*". Bankrupt talked to appellant about long-term financing, discussed his financial condition with appellant; and testified that he told appellant that he (bankrupt) was doing a lot of expanding and needed additional cash at various times (Vol. I, Tr. 42); and stated that Appellant never came down (to bankrupt's place of business) and did not "make an audit of these assets that are described in that mortgage" (Vol. I, Tr. 43).

8. Appellant permitted the November 22, 1957, note and mortgage to remain past due and dormant after May 22, 1958, without enforcing the terms thereof and without timely asserting its mortgage lien, from May 22, 1958, when said mortgage loan became due until July 8, 1959, when C.C.C. seized *all* of bankrupt's property in a replevin ac-

tion (Vol. II, Tr. p. 40, Par. 2); from July 8 until July 13, 1959, the date of bankruptcy (Vol. I, Tr. 6) and *after bankruptcy* until September 29, 1959, when the trustee recovered the replevined property; from September 29 until November 5, 1959, the date of the Order for Sale of bankrupt's property (Vol. II, Tr. 12) secured with the cooperation and consent of appellant's attorney (Vol. II, Tr. 8-13) under a petition which directly challenged the validity of appellant's said mortgage (Vol. II, Tr. 11, par. 5); from November 5 until November 9, 1959, when said property was sold and delivered to the purchaser free and clear of all liens without appellant asserting any lien rights thereto or appellant having secured the Referee's or the District Court's order transferring appellant's lien rights, if any, to the fund received from said sale; and from November 9, 1959 until January 19, 1960, when appellant first asserted a mortgage lien under said November 22, 1957, mortgage by filing the aforementioned claim as a secured creditor on said date, as stated supra (Vol. I, Tr. 15-17).

9. As to what constituted the collateral for the November, 1957, mortgage loan, appellant's evidence is that bankrupt had the latest type of equipment, had good fixtures and shop equipment and was adding to them through the years (Vol. I, Tr. 61).

10. It is stipulated (both parties reserving the right to offer additional evidence); (a) that the May 12, 1959, mortgage loan for $12,000.00, due May 1, 1959, was not recorded; that the cash for this loan went into bankrupt's bank account; that this loan was in addition to the November, 1957, mortgage loan and that said note was cancelled (paid) (Vol. I, Tr. 23, par. 2, also pages 30-32); (b) that the June 3, 1959, mortgage loan for $16,000.00, due on demand, was not recorded; that $3,000.00 of said loan was applied to pay the unpaid balance still due on the

May, 1959 loan and $13,000.00 was deposited in bankrupt's bank account; that this loan was in addition to the November, 1957 mortgage loan (Vol. I, Tr. 23, par. 3, also pages 33-35).

11. Bankrupt's testimony with respect to said May and June, 1959 mortgage loans is: that he had a discussion with appellant's president Finks when he made said loans with respect to his condition and need for capital and told Finks that he (bankrupt) was in a tight spot and needed a long-time loan; that Finks said the bank couldn't go on a long-time loan so bankrupt started negotiating with C.C.C. on June 22, 1959, by asking for an appointment (Vol. I, Tr. 50); that C.C.C.'s Mourning was to come down to Clinton on June 30; that before agreeing to said date, bankrupt told Finks that he (bankrupt) had this date and Finks said he would go along with bankrupt until that date; that when Mourning came down on June 30, he and C.C.C.'s Hughes made an inventory of bankrupt's free and clear cars; that bankrupt and Mourning had started negotiating a loan when Mourning had a (telephone) call that appellant bank had taken bankrupt's bank account and returned bankrupt's checks; that Mourning and Finks then had a conversation at bankrupt's place of business (Vol. I, Tr. 51); that after the bank had taken bankrupt's bank account and bankrupt "seen what was happening", bankrupt took what car titles he could and went up to Finks and told him that it looked like C.C.C. was putting on pressure and were going to close the place and that he (bankrupt) would like to straighten out some paper (the May and June, 1959 mortgages) because appellant didn't have any car titles or anything filed and bankrupt knew that said mortgages "wasn't too valuable" and on July 1 bankrupt gave appellant the July 1, 1959 note and mortgage due on demand for $6,266.12 (balance remaining

on the June 3, 1959, loan after crediting $9,733.88 setoff) which appellant filed on July 2, 1959, and said car titles to help the bank; that said July 1 demand mortgage provided that "This is a continuation of the chattel mortgage dated June 3, 1959" (Vol. I, Tr. 52, 39).

12. On cross-examination bankrupt stated: that he told Finks that he (bankrupt) was over-expanded and that this (May, 1959 loan) wouldn't solve all his problems but it would help; that the May loan was a stop-gap loan until he could get long-term financing; that in June, bankrupt made the $16,000.00 demand loan, the long-term loan hadn't come through yet; that bankrupt was keeping Finks informed as to his progress in negotiating this (long-term) loan with C.C.C. (Vol. I, Tr. 54). Said May and June, 1959 mortgage loans carry the notation "This note was not filed. We held car titles" (Vol. I, Tr. 32, 35).

13. On re-direct examination bankrupt testified: that he didn't get any money for the July 1, 1959 mortgage; that after he gave appellant the July 1, 1959 demand mortgage (filed July 2, 1959), appellant picked up those 15 cars in the evening from five or six to about midnight on July 4 or 5, 1959, which appellant sold for $4,500.00 and credited that amount to bankrupt's loan account (Vol. I, Tr. 56, 57, also p. 41).

14. Appellant's president Finks testified: that the November 22, 1957 loan secured all future indebtedness between appellant and bankrupt (Vol. I, Tr. 58) which included the May and June, 1959, unrecorded mortgage loans; that bankrupt received $13,000.00 additional cash from the June 3, 1959, mortgage loan; that the purpose or reason for making the May and June, 1959, loans was to carry bankrupt over a very short period of time while he was getting a loan which bankrupt told Finks was coming from C.I.T. or C.C.C. (Vol. I, Tr. 59); that about June 30, 1959, appel-

lant understood C.C.C. would advance bankrupt the money which would pay appellant's loans in full; that Finks was called to bankrupt's office on June 30, and it appeared to Finks that this money was not forthcoming from C.C.C.; that Finks went back to the bank and on June 30 made a $9,733.88 setoff against bankrupt's bank account (Vol. I, Tr. 60-62); that after the setoff, the balance due on the June 3, 1959, $16,000.00 mortgage loan was $6,266.12, so on July 1, 1959, appellant took another note and mortgage for $6,266.12 on 15 free and clear cars, due on demand (Vol. I, Tr. 39-41), recorded this mortgage, and several days later took possession of these 15 cars which it sold for $4,500.00 (Vol. I, Tr. 60-62); that there was no reason why the November, 1957, loan on bankrupt fixtures equipment etc. was not paid as scheduled except that appellant just kept it and left its collateral the same as it had been; that bankrupt always kept good equipment for his shop, the latest type, and valued it at considerable more than he did his inventory at different times in his statements (Vol. I, Tr. 61, 62); that when bankrupt executed this July note and when bankruptcy occurred, bankrupt still had all these fixtures and actually was adding to them through the years (Vol. I, Tr. 61).

15. On cross-examination Finks stated: that the reason appellant didn't record the May 12 and June 3 mortgages was because it felt that it had ample security in its 1957 loan to cover these additional advances and in addition bankrupt continually told Finks that he (bankrupt) had the money coming from C.I.T. and C.C.C. which would pay appellant in full, including its 1957 loan; that when appellant got the July 1st mortgage it gave bankrupt no money; that two or three days later appellant's buyer went down and picked up those cars which were in appellant's possession and which appellant had sold for $4,500.00 (Vol.

I, Tr. 62); that on June 30, 1959, appellant charged off $9,733.88 against bankrupt's bank account (Vol. I, Tr. 63).

16. Bankrupt recalled giving appellant a financial statement in March of 1959, before the May $12,000.00 loan was made which indicated bankrupt's net worth to be approximately $113,000.00 (Vol. I, Tr. 53, also p. 37); appellant's Finks stated that bankrupt furnished him a financial statement showing a very large net worth; that he (Finks) did not at any time have cause to believe that bankrupt's financial statement wasn't correct; and that he (Finks) did not, at any time have cause to believe bankrupt was, in fact, insolvent; and that when appellant made the May and June loans, it gave bankrupt cash at that time (Vol. I, Tr. 59).

17. The following are some of the facts common to all transferees involved in the four turn-over proceedings, jointly heard as stated supra:

1. That as of December 31, 1957, bankrupt's business was insolvent by the amount of $37,990.10; as of December 31, 1958, it was insolvent by the amount of $126,933.73; and as of May 31, 1959 (approximately 6 weeks prior to bankruptcy) it was insolvent by $149.072.73. (Stipulation as to transferees, 17 "local" Clinton people filed March 30, 1964, par. 4; Stipulation as to transferee C.C.C. filed February 27, 1964, par. 16) (Vol. II, Tr. 39).

2. That on June 29 and 30, 1959, bankrupt gave C.C.C. 27 checks drawn on appellant's bank to cover his shortage for cars sold without remittance to C.C.C. in the sum of $53,577.89 and for unremitted collections from customers collected on behalf of C.C.C. totalling $1,916.06; appellant returned all of said checks to C.C.C. unpaid. (Stipulation as to transferee C.C.C. filed February 27, 1964, pars. 3, 10, 15, and Exhibit "I") (Vol. II, Tr. 40).

3. That on July 8, 1959, C.C.C. foreclosed on *its* July 1, 1959, demand chattel mortgage and all other of bankrupt's mortgages which it then held "by a replevin suit filed in the United States District Court, numbered there 12427, in which proceeding the United States Marshal seized the property covered by said mortgages under a writ of replevin issued by said court and delivered same to C.C.C. at Clinton. C.C.C. removed same from bankrupt's place of business." (Stipulation as to transferee C.C.C. filed February 27, 1964, par. 6) (Vol. II, Tr. 40).

4. That on July 1, 1959, C.C.C. left its employee, Hughes, in Clinton, who stayed in and around bankrupt's business during business hours until July 9, 1959, "to protect the interests of C.C.C. with respect to sales by bankrupt of any cars upon which it held mortgages. Hughes collected the proceeds of certain sales ($12,437.45) for this purpose. (Stipulation as to transferee C.C.C. filed February 27, 1964, pars. 4, 12) (Vol. II, Tr. 40).

5. That on July 1, 1959, bankrupt owed approximately $273,000.00 * * * that bankrupt's liabilities ($273,000.00) exceeded bankrupt's assets ($163,000.00) by approximately $120,0000.00 (Supplemental Stipulation as to transferee C.C.C. filed March 17, 1966, page 42).

6. That the record (in the bankruptcy proceeding) shows that 77 claims (including claim filed by C.C.C. and appellant) were filed in said proceeding; * * * that of the 77 general claims and 35 priority claims * * * at least 20 of said general claims show that said general creditors extended credit to bankrupt between June 30 and July 13, 1959, and that 22 of said priority claims were for services rendered to the bankrupt between July 3 and July 11, 1959 (Supplemental Stipulation as to transferee C.C.C. filed March 17, 1966, par. 13, pages 63, 64).

ARGUMENTS

I.

As to Questions Presented Numbered 1 (a) and (b).

General Order in Bankruptcy No. 37 (11 U.S.C.A. following Section 53) makes Federal Rules of Civil Procedure applicable to bankruptcy proceedings "in so far as not inconsistent with the Act". Federal Rule of Civil Procedure No. 52 (a), applicable to bankruptcy proceedings, states that "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses". Likewise General Order Bankruptcy No. 47 (citation supra) states that unless otherwise directed in the order of reference the Referee "shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous".

In its opinion (Vol. III, Tr. 67, 68, Appendix A, pp. A7, A8) the Court of Appeals considers, as the only Standard of Review applicable in this matter, the *clearly erroneous* rule stated in *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 365, that: "A finding is clearly erroneous when although there is evidence to support it, the reviewing court *on the entire evidence* is left with the definite and firm convictions that a mistake has been committed" (Italics furnished); it erroneously applied the Gypsum *clearly erroneous* rule, for a first time, to *less than the entire evidence*, when it denied Appellee's Motion to Vacate Setting of the Appeal (Vol. III, Tr. 1-59, 60) and declined to hold-up and reset the hearing on appeal until the required *entire evidence*, as the same was presented

at the joint hearing and was considered by the Referee and District Court, could also be presented to and considered by the Court of Appeals as stated and supported in said motion.

Appellant could suffer no injustice from the granting of Appellee's said motion since Appellant already had and was using the funds which Appellee was seeking to recover, but injustice was suffered by Appellee both from the denial of said motion and from the error of the Court of Appeals in applying the Gypsum rule to a partial record instead of the *entire evidence* as presented in this and the three other related causes.

Without the *entire evidence* the Court of Appeals could not determine "from *the entire evidence*" whether the Referee's findings at bar are clearly erroneous without considering other standards of review established by the cases interpreting the aforementioned rules which the Court of Appeals completely disregarded and limited itself to the one Standard of Review stated in the Gypsum case.

The courts have discussed this question. In *Morris Plan Industrial Bank* v. *Henderson*, 131 F.2d 975, 976, Pars. 1, 3 (C.A. 2), Judge Learned Hand spoke thus:

> "Everyone forms his conclusions from testimony, not only from the words which he hears the witnesses utter, but from their appearance when they utter them; and the added weight to be attached to a referee's findings or a judge's (if he sees the witnesses) depends upon the fact that he has in effect had evidence before him which cold print does not preserve. So far, therefore, as the words themselves leave any latitude, the referee's conclusions ought to prevail because we cannot appraise the cogency of the lost evidence. In the end, as we have often said, the responsibility for the right conclusion remains the judge's

> as indeed it does ours (citing); but we have again and again held that except in plain cases he should accept the referee's findings (citing). We, therefore, hold that the question is the same in this court as it was in the district court."

To the same effect is *In re Skerentny*, 199 F.2d 488, 492 (C.A. 7).

The chain of circumstances set out in the statement, supra, and those set out, infra, give importance to *In re Fredman*, 164 Fed. 131, where the court stated:

> "Louis Fredman and E. M. Reiselbach testified unequivocally that they had no knowledge of the financial condition of the bankrupt at any time. The bankrupt corroborated them in this regard, and there was slight positive evidence to the contrary. Counsel therefore argues the court must, as a matter of law, find their contention established. But such is not the law. If positive evidence is inherently improbable, the court may reach a conclusion based upon the circumstantial evidence in the case which is more convincing."

Unless other interpretations of said rules, as called to the attention of the Court of Appeals, are regarded and considered or the clearly erroneous rule stated in the Gypsum case is applied to the *entire evidence and not to a partial record*, said rules are rendered ineffectual and are destroyed. Said rules cannot be by-passed by a generalization that "a mistake has been committed" based on only a *part* of the submitted evidence. By using such generalization, the Court of Appeals was enabled to and did disregard, ignore and refuse to enforce Sections 60 a, b, and c, 67 d (6) (7), 70 a, c and e (Pars. 1, 2) of the Bankruptcy Act (11 U.S.C.A., Secs. 96, 107, 110) in that Appellant received a voidable preference when it received payment of the May and June, 1959 mortgage loans totalling $25,000.00

on the eve of bankruptcy recoverable under Section 60 a, b and c; in that said May and June, 1959 mortgage loans were fraudulent and void as to creditors and the trustee under Sections 67 d (6) (7), and 70 a, c, and e (Pars. 1, 2) of said Act, having been kept secret and unfiled which made said mortgages void as to the trustee and creditors, and void under Section 443.460, Vernon's Ann. Mo. Statutes; in that the funds received from Appellant on said mortgage loans were deposited in bankrupt's general bank account and were used in the operation of bankrupt's business (Vol. I, Tr. 23, Pars. 2, 3, Court of Appeals Opinion, Vol. III, Tr. 3, 4, Appendix A, p. A23) and became part of bankrupt's general estate. So says the United States Supreme Court in *National City Bank of New York* v. *Hotchkiss,* 231 U.S. 50, 34 S. Ct. 20, l.c. 21, 22, where the court decided this question, saying:

> "As all trace of the bank's money was lost when it entered the stream of the firm's general property, there can be no right of subrogation. Neither can the claim be upheld on the ground that there is no diminution of the bankrupt's assets, or the transaction should be regarded as instantaneous and one. The consent to become a general creditor for an hour, that was imported, even if not intended to have that effect, by the liberty allowed to the firm, broke the continuity and established the loan as part of the assets. No doubt many creditors have increased a bankrupt's estate by their advances, but they have lost the right to take them back."

See also 3 *Collier on Bankruptcy* (*14th Ed.*), Section 60.01, pp. 744-752.

That an interlaced and inter-related situation running through and common to the aforementioned four turn-over proceedings existed and made the joint hearing thereof imperative is demonstrated by the following excerpt from the

entire evidence: after C.C.C.'s Mourning and Hughes had made an inventory of all of bankrupt's free and clear used cars, Hughes and Mourning discussed with bankrupt the possibility of using bankrupt's said free and clear used cars that were not on floor plan to C.C.C. at that time, and set up said used cars on a purchase money chattel mortgage to C.C.C. to offset a portion of the $53,000.00 shortage bankrupt owed C.C.C. on new and used cars previously floor planned to C.C.C. that were sold and not paid. In the afternoon of June 30, 1959, bankrupt was agreeable to apply such used cars as collateral toward the debts. Mourning and Hughes arranged a meeting with bankrupt for that evening (June 30) to prepare and sign the chattel mortgage. Bankrupt was not there when they arrived. Mourning went ahead and prepared the mortgage that evening (June 30). [This was the same evening when bankrupt went to Appellant bank and voluntarily gave it the chattel mortgage post-dated July 1, 1959, on fifteen of said free and clear used cars.] Bankrupt came in later that evening and stated he wasn't sure that all of said used cars were free from encumbrances and wanted to wait until the next morning (July 1) before he signed any mortgage covering any cars (C.C.C. Supp. Stip. Par. 9 f, pp. 52, 53). The following morning (July 1) bankrupt stated he would not sign the mortgage as written; that he found there was a lien against some of the cars. [This was Appellant's July 1, 1959 mortgage.] Mourning and Hughes then checked the courthouse records and found that appellant had filed a chattel mortgage against a major portion of the cars described in the chattel mortgage prepared the evening before (June 30) which had been filed for record that morning in favor of Appellant. Only remaining was a few lesser value used cars on which C.C.C. was able to take a chattel mortgage (C.C.C. Stip. Par. 3 and Supp. Stip. Par. 9 f, pp. 53, 54).

There were such incidents common to all of said turnover proceeding see-sawing through said joint hearing.

II.

As to Question Presented Numbered 2(a), (b), (c) and (d).

This question relates to the November 22, 1957 $16,000.00 note and chattel mortgage. At page 6 of its opinion (Vol. III, Tr. 66, Appendix A, p. A6) the Court of Appeals says "The Referee ruled the chattel mortgage of November 22, 1957, invalid * * *". There is no such ruling (Vol. I, Tr. pp. 65-71); the Referee only subordinated Appellant's claim because of its conduct detrimental to creditors by reason of Appellant's conduct in failing to enforce the provisions of said mortgage and to timely assert its *lien*, as discussed infra.

At page 10 of its opinion (Vol. III, Tr. 70, Appendix A, p. A10) the Court of Appeals gives force to oral agreements made between the parties to the mortgage *prior to bankruptcy* and holds that such oral agreements bind the trustee *after bankruptcy*. Oral agreements made *prior* to bankruptcy do not bind the trustee upon the advent of bankruptcy. In *Fairbanks Steam Shovel Co.* v. *Wills*, 240 U.S. 642, 36 S. Ct. 466, 469, 60 L. Ed. 841, the Supreme Court discussed this question and said:

> "It is hardly necessary to say that whatever equities, if any, arose out of the mortgagor's representation that its principal place of business was Beardstown, or out of the fact that the mortgage was given to secure a part of the purchase price of the dredge, *were confined in their effect to the immediate parties, and could not operate to estop the trustee in bankruptcy representative of the interests of creditors for whose protection the recording act was passed.*" (Italics furnished).

See also *In re Urban*, 136 F.2d 296, 297, 298 (C.A. 7) and Section 443.460, *Vernon's Ann. Missouri Statutes.*

The November, 1957 note and mortgage became due on May 22, 1958 (Vol. I, Tr. 28, 29) at which time the unpaid balance was $11,000.00. By oral agreement between the parties, Appellant subsequently made payments thereon until May 7, 1959, at which time the unpaid balance was $6,000.00 (Vol. I, Tr. 29, 23). No extension was endorsed on the note nor was any written extension agreement made. When bankrupt stopped making payments on May 7, 1959, he told Appellant "I couldn't meet the obligation and we had others * * *" (Vol. I, Tr. 42). Bankrupt also talked to Appellant about long-term financing and discussed his financial condition. Bankrupt told Appellant that he (bankrupt) was doing a *lot* of expanding and needed additional cash at various times (Vol. I, Tr. 42). Appellant did not come down to bankrupt's place of business and make an audit of the assets described in the November, 1957 mortgage (Vol. I, Tr. 43). Thus from November 22, 1958 and thereafter Appellant did not know whether the described assets were there or had been replaced by the expansion.

Appellant permitted the November 22, 1957 note and mortgage to rest past due after May 22, 1958, without enforcing the terms thereof and permitted it to lie dormant without timely asserting its mortgage lien from May 22, 1958, when said debt became due, until July 8, 1959, when C.C.C. seized *all* of bankrupt's property in a replevin action (Vol. II, Tr. 40, Par. 2); from July 8 until July 13, 1959, the date of bankruptcy (Vol. I, Tr. 6) and *after* bankruptcy until September 29, 1959, when the trustee recovered the replevined property from C.C.C.; from September 29 until November 5, 1959, the date of the Order for Sale of bankrupt's property (Vol. II, Tr. 12), secured with Appellant's

cooperation and consent through its attorney (Vol. II, Tr. 8-13), under a petition which directly challenged the validity of Appellant's said mortgage (Vol. II, Tr. 11, Par. 5); from November 5 until November 9, 1959, when the trustee sold and delivered said property to the purchaser free and clear of all liens (Vol. II, Tr. 10-15) without Appellant asserting a lien right to the property at the sale and without Appellant having secured or requesting the Order of the Referee or the District Court transferring Appellant's lien rights, if any, to the fund received from said sale; from November 9, 1959 until January 19, 1960, when Appellant first asserted a lien under said November 22, 1957 mortgage by filing its claim for $6,000.00 as a secured creditor on said date but long after said property had been sold and delivered to the purchaser, and when it was impossible to ascertain whether the purported mortgaged property or any part thereof had been sold and delivered, and if so, when it was impossible to ascertain what part was sold and what amount was received therefor. Appellant failed and refused to submit this question to the courts when the courts could fairly decide the same but coyly preferred to defer submission thereof to the courts until it was too late for the courts to consider and rule it fairly as to creditors.

Appellant's President Finks testified: that the November 22, 1957 mortgage also secured all future debts between Appellant and bankrupt which included the May and June, 1959 unrecorded loans (Vol. I, Tr. 58); that the reason Appellant didn't record said mortgages was because it felt that it had ample security in its November, 1957 loans to cover said loan and these additional advances (Vol. I, Tr. 62).

It will be remembered that bankrupt explained to Appellant that Appellant was doing a *lot* of expanding and

needed additional cash from time to time (Vol. I, Tr. 42); that he was *over-expanded* (Vol. I, Tr. 54). This statement of volume in expansion gave rise to a duty on Appellant to seasonably assert its lien so as to seasonably determine whether any of the fixed assets described in said 1957 mortgage were there or whether such original fixed assets had been replaced under what bankrupt told Appellant was a *lot* of expanding and *over-expansion* as stated supra. It requires no great discussion to sustain the statement that when Appellant was rendered unable to meet his obligations to Appellant *and others*, as stated supra, it could not have resulted from a minor expansion, and it may be inferred, at least, that when Appellant spoke of a *lot of expansion and being over-expanded*, Appellant knew of what bankrupt spoke and what bankrupt meant. In the case of *In re Fredman*, 164 Fed. 131, the court there ruled:

> "If the positive evidence is inherently improbable, the court may reach a conclusion based upon the circumstantial evidence in the case which is more convincing."

Appellant's testimony that it felt it had ample security under the November, 1957 loan to cover that loan and the unrecorded May and June, 1959 additional advances (Vol. I, Tr. 62) does not comport with its conduct. When on June 30, 1959, Appellant deemed it necessary to seize bankrupt's bank account ($9,733.88) (Vol. I, Tr. 60-62) Appellant did nothing and made no effort to foreclose the 1957 mortgage; when on July 1, 1959, the next day after Appellant seized said bank account, bankrupt voluntarily executed a new July 1, 1959 chattel mortgage to claimant to protect claimant against the $6,266.12 deficiency on the June 3, 1959 mortgage loan (Vol. I, Tr. 39-41), Appellant still did nothing and made no effort to foreclose the 1957

mortgage; on July 4 or 5, when claimant seized the fifteen free and clear used cars covered by said July 1, 1959 mortgage (Vol. I, Tr. 60-62), again Appellant did nothing and made no effort to foreclose the 1957 mortgage; on July 8, 1959, when C.C.C. seized bankrupt's assets (which included all of bankrupt's fixtures, tools, equipment and machinery, *as it was on that day*) under a Writ of Replevin, Appellant did not intervene in said proceeding and claim a prior lien in the seized property by virtue of its 1957 mortgage (Vol. II, Tr. 40) but instead did nothing and made no effort to foreclose its 1957 mortgage. The foregoing is Appellant's course of conduct *prior to bankruptcy* when the 1957 mortgage was still good as between the parties.

After bankruptcy, Appellant followed the same "do-nothing" course. It filed no timely reclamation in the bankruptcy proceeding with respect to said 1957 mortgage, instead it did nothing and made no efforts respecting the same; on November 5, 1959 (approximately four months after bankruptcy) the trustee petitioned for and secured an Order to sell bankrupt's property and on November 9, 1959 reported the sale and secured the Referee's Order confirming the same (Vol. II, Tr. 10-15), and Appellant still did nothing and made no effort with respect to said 1957 mortgage; on January 19, 1960, more than two months after the sale of bankrupt's property and six months after bankrupt's adjudication, Appellant first asserted a lien under said 1957 mortgage by filing the claim mentioned supra and thus Appellant deferred filing said claim for two months after said property had been sold and delivered to the purchaser when it was impossible to ascertain what, if any, rights Appellant had under said mortgage in and to the property so sold.

Appellant's said conduct and "do nothing" policy created such inequity as to the trustee and the creditors

that by its aforesaid conduct, Appellant subordinated itself and under the law, the Referee was justified in ruling that Appellant's lien rights were subordinate to the rights of bankrupt's creditors.

In *Prudence Realization Corporation* v. *Geist*, 316 U.S. 89, 95, 62 S. Ct. 978, 982, 86 L. Ed. 1293, the Supreme Court, speaking of subordination said:

> "It is for that court (the court of bankruptcy) not without regard for rights acquired under rules of state law—to define and apply federal law in determining the extent to which the *inequitable conduct of a claimant in acquiring or asserting his claim in bankruptcy requires its subordination.*" (Italics furnished).

To the same general effect is *In re Kansas City Journal-Post Co.*, 144 F.2d 791, 800 (C.A. 8).

The aforementioned facts with respect to Appellant's "do nothing" policy and its failure or refusal to timely assert a lien from May 22, 1958 until January 19, 1960, places Appellant's present claim within the *principle of law* announced in *In re Loewer's Gambrinus Brewery Co.*, 74 F. Supp. 909, 913, 914, where a claim in bankruptcy was ruled dormant and was subordinated to the claims of creditors and where that court said:

> "The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain. If it does not, equity will set it aside. That standard of fiduciary obligation is designed for the protection of creditors as well as stockholders. A consideration in the determination of such equities is whether or not the claim has been permitted to lie dormant for years and are sought to be enforced only when the debtor corporation is in financial difficulty. Pepper v. Litton, 308 U.S. 295, 304, 305, 306, 307 and 311, 60 S. Ct. 238, 84 L. Ed. 281.

> It is, of course, recognized that in liquidations distribution should be made by dividends of an equal percentum of allowed claims of creditors; but balanced against this is the right to subordinate where the conduct of the claimant is contrary to established equity principles." (Italics furnished).

Subordination of claims was discussed in *In re Kansas City Journal Post Co.*, 144 F.2d 781, 800 (C.A. 8), where court stated the principle of subordination thus:

> "Subordination is a means of regulating distribution results in bankruptcy by adjusting the order of creditors' payments to the level of then comparative claim positions. As indicated above, its fundamental aim is to undo or to offset an inequity in the claim position of a creditor that will produce injustice or unfairness to other creditors in terms of bankruptcy results."

The Referee properly subordinated Appellant's claim under the 1957 mortgage when Appellant trapped the trustee and bankrupt's creditors by its conduct to the point where it was impossible to accurately try and determine Appellant's rights if timely presented which Appellant failed and refused to do.

Appellant has not preserved and has no equitable rights under Section 60 a(6) of the Bankruptcy Act (11 U.S.C.A., Sec. 96 Supp.) and under the Missouri law with respect to after-acquired property (acquired when expanding). Section 60 a(6) provides against recognition of equitable liens where the requirements of the applicable law have not been complied with.

The 1957 mortgage described certain property now owned or *hereafter purchased during the life of this loan.* The *lot* of expansion and the *over-expansion* (Vol. I, Tr. 42, 54) comprehends such after-acquired property. The law of Missouri is that only an equitable lien attaches to

such after-acquired property when the same comes into existence or is acquired by the mortgagor and that the legal title as required by said Section 60 a(6) will not pass unless the mortgagee takes possession of the property before the rights of innocent third parties have attached. At bar Appellant never took possession of such after-acquired property and the rights of bankrupt's creditors have attached. In *World Investment Company* v. *Kolburt,* 317 S.W.2d 697, 700, 701 (Pars. 1-7) (Mo. App.), the court said:

> "World's claim is based upon a duly recorded chattel mortgage, executed prior to the purchase of the Cadillac by appellant Berin. The provisions of the mortgage were breached prior to the institution of this action. World, assignee, was entitled to possession under the terms of the mortgage unless it was void as a mortgage on after-acquired property. A mortgage on after-acquired property is void as to third parties unless the mortgagee takes actual possession before the rights of third parties accrue."

In *Stickel* v. *Swift & Co.,* 56 S.W.2d 806, 808, Par. 2 (Mo. App.), the rule respecting after-acquired property is stated thus:

> "The rule is that, where the mortgagee does not take possession of the after-acquired property upon its acquisition by the mortgagor and before the rights of an innocent third party have attached, the provision in question will be held void as to such innocent third party, *nor will the constructive knowledge furnished by the recording of the instrument be regarded as sufficient notice.*" (Italics furnished).

See also *Personal Finance Co. of Missouri* v. *Lewis Inv. Co., et al.,* 134 S.W.2d 655, 656, Pars. 2, 3 (Mo. App.) and *Bank of Kenneth* v. *Clayton et al.,* 241 Mo. App. 487, 245 S.W.2d 678, 683, 684, Pars. 5-9.

Appellant waived its lien and is estopped to assert same. The record shows that on November 5, 1959, Appellee filed petition to sell the replevined property (Vol. II, Tr. 10-12). In said petition (par. 5), it is alleged:

> "That so far as petitioner knows all of said property and assets to be sold under order of sale made hereunder are free from any mortgages except a note and chattel mortgage to Farmers Bank of Clinton dated November 22, 1957, recorded November 23, 1957, number 31260, in the sum of $6,000.00 which purports to be a chattel mortgage on fixtures and equipment of the Woody Motor Company when it was located on South Main Street in Clinton, Missouri."

The District Court made the requested Order of Sale (Vol. II, Tr. 12) at which Appellant's attorney also appeared as attorney for Appellee in securing said Order. Appellee accordingly sold said property, reported the sale thereof, free and clear of any encumbrances, on November 9, 1959, and said sale was approved (Vol. II, Tr. 13-15). Appellee's letter dated November 5, 1959, which accompanied the filing of the petition for an order to sell advised the Referee of a bid of $23,000.00 at private sale and that *Mr. Brock* (*Appellant's attorney*) and Appellee recommended that it would be in the best interest of the estate that the court approve the petition to sell the personal property (Vol. II, Tr. 8-10). The Order confirming private sale refers to this letter (Vol. II, Tr. 14, 15). Notwithstanding the fact that said petition for order to sell (par. 5) recited that Appellant held a "purported" chattel mortgage (Vol. II, Tr. 9), Appellant did not then assert a mortgage lien although its mortgage was challenged but instead appellant permitted said property to be sold and delivered to the purchaser and said sale to be approved without doing so at the sale or otherwise. By Appellant's failure to so do, by its conduct which constituted consent

to the sale, by Appellee's unchallenged letter dated November 5, 1959 (Vol. II, Tr. 8-10), by Appellant's participation in the proceedings to sell such property (Vol. II, Tr. 10-14), and by the Referee's reliance on said letter (Vol. II, Tr. 14, 15), Appellant waived its mortgage lien and is estopped to claim the same. The aforesaid facts and circumstances and the authorities cited infra, support the Referee's ruling to that effect.

In *Farmers Nat. Bank* v. *Missouri Livestock Commission Co.*, 53 F.2d 991, 996 (C.A. 8), the endorsee failed to assert a mortgage lien over an extended period of time and mortgagor had sold the mortgaged property, the court said:

> "The consent to sale waives lien whether purchaser knew of lien or not (Citing).
>
> That consent may be shown from implication arising from a course of conduct as well as by express words (Citing).
>
> Mr. Geis testified that cattle were sold subject to the mortgage. Of course, that is a mere conclusion of his which, as a matter of law, is erroneous. The fact of sale, as pointed out in Moffett Bros. & Andrews Commission Co. v. Kent, (Mo. Sup.), supra (5 S.W.2d 395), is inconsistent with continuation of the mortgage lien."

In *First Nat. Bank & Trust Co., etc.* v. *Stockyards Loan Co.*, 65 F.2d 226, 229, 231 (C.A. 8), the court said:

> (229) "The bank did not advise the commission houses through which sales were made that it held mortgages on cattle; nor did it have its mortgages listed with Cattle Rangers Association whose business it was to check the sales and see that the mortgages were protected as to the proceeds."

In ruling, the Eighth Circuit, at page 229, continued:

> "The facts and circumstances heretofore mentioned showing lack of care on the bank relative to

> the location of the cattle at the time of making the chattel mortgages, relative to the movements of the cattle from county to county after the mortgages were made, relative to any segregation by the bank of the cattle covered by its mortgages from a larger number in the pastures, all tend to emphasize the same lack of care on the part of the bank relative to the sale of cattle."

At page 231 the court concludes:

> "Our conclusion upon the whole record is that there was a clear waiver by the bank of its rights under the chattel mortgages held by it, both as to the movements of the cattle and the sales thereof by Moore."

The Missouri courts follow this rule.

In *Stockyards Nat. Bank* v. *B. Harris Wool Co.*, 289 S.W. 622, 632, 633, 634, 316 Mo. 427, the Supreme Court of Missouri was of the opinion:

> (632) "that the evidence conclusively shows that plaintiff impliedly consented to or acquiesced in, the sale or consignment of the wool by Wrathall, and thereby waived the lien or security of the mortgages, insofar as the wool in controversy is concerned. Hence we are of the opinion that plaintiff is estopped by its conduct * * *."

At page 633 of the *Stockyards* case cited supra, the Missouri Supreme Court quotes from *Peterson* v. *Elevator Co.*, 9 N.D. 55, 81 N.W. 59, with approval, as follows:

> "* * * It (the testimony) shows that the mortgagee saw fit to authorize the mortgagor to sell the property covered by the mortgage at private sale; and this authority was given under such circumstances as would, if acted upon, result, not only in a removal of the property from the premises of the mortgagor, but likewise in mixing the same with other grain, in one common mass, thereby rendering it impossible for the

> mortgagee thereafter to identify the property and take possession of it for the purposes of foreclosure. These facts, in our judgment, must operate as an implied waiver of the lien of the mortgage (Citing)."

In *Rogers* v. *Davis*, 184 S.W. 151, 155, 194 Mo. App. 378, the court ruled:

> "A mortgagee may fully waive his rights under the chattel mortgage though the same remains unreleased of record (Citing)."

As to the effect of the oral agreement extending time, which Appellant is said to have accorded bankrupt, note the case of *Connersville Buggy Co.* v. *Lowry*, 104 Mo. App. 186, 77 S.W. 771, where the court says:

> "It is held in Bowens v. Benson, 57 Mo. 26, that an agreement for the extension of the time for the payment of the debt did not postpone the mortgagee's right to possession of the mortgaged property for * * * failure to pay the debt at the time originally agreed on. See also Baldridge v. Dawson, 39 Mo. App. 527."

III.

As to Questions Presented Numbered 3(a), (b), (c) and (d).

The Court of Appeals' concept of appellant differs from that of Referee. With respect to the May 12, 1959 mortgage loan, the Court of Appeals says: that bankrupt "represented to the bank that he needed the money for operating capital until a major loan could be obtained from C.C.C." (Opinion p. 3, Vol. III, Tr. 63, Appendix A, p. A3); that appellant "went to lengths to aid and assist the bankrupt in his operations and should not be penalized for trying to help the bankrupt keep intact his business" (Opinion p. 14, Vol. III, Tr. 74, Appendix A, p. A14); that the May and June (1959) chattel mortgages were void *as to creditors* because they were not filed of record and the July (1),

1959 chattel mortgage was a voidable preference as it was given for an antecedent debt (Opinion p. 16, Vol. III, Tr. 76, Appendix A, p. A16); that the amount (set off of $9,733.88) "was in a general checking account used in the ordinary course of business by the bankrupt" (Opinion p. 16, Vol. III, Tr. 16, Appendix A, p. A16); that the May and June loans enriched the debtor's estate and that creditors are treated unequally to the extent the preferential payments of the May and June 1959 loans "exceeded the new advances" (Opinion pp. 25, 26, Vol. III, Tr. 85, 86, Appendix A, pp. A25, A26).

These observations refer largely to relations between the parties and disregard the rights of creditors on the advent of bankruptcy which are controlled by Sections 60 a, b and c, 67 (6) and (7) and 70 a and c, pars. 1 and 2, of the Bankruptcy Act (cited supra) and disregard the applicable ruling in *National City Bank, etc.* v. *Hotchkiss*, 231 U.S. 50, 34 S. Ct. 20, l.c. 21, 22, where the United States Supreme Court observed:

> "But, if the intent is doubtful or inconsistent with the legal effect of dominant facts, it must fail,"

and in ruling facts most similar to those at bar that court held:

> "As all trace of the bank's money was lost when it entered the stream of the firm's general property, there can be no right of subrogation. Neither can the claim be upheld on the ground that there is no diminution of the bankrupt's assets, or the transaction should be regarded as instantaneous and one. The consent to become a general creditor for an hour, that was imported, even if not intended to have that effect, by the liberty allowed to the firm, broke the continuity and established the loan as part of the assets. No doubt many creditors have increased a bankrupt's estate by their advances, but they have lost the right to take them back." (Italics furnished).

Section 60 a, b and c of the Bankruptcy Act (cited supra) deals with Preferences; Section 67 d (6) and (7) thereof deals with Liens and Fraudulent Transfers; 70 a, c and e, pars. 1 and 2 thereof provides that any transfer which "under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this title, shall be null and void as against the trustee of such debtor".

Under 60 a (1) the preference must be a transfer to a creditor for an antecedent debt, made by debtor while insolvent or within four months before the filing of a petition in bankruptcy, the effect of which "will be to enable such creditor to obtain a greater percentage of his debt than some other of the same class". Section 60 b provides that such preference may be avoided by the trustee, if the creditor receiving it, at the time when the transfer is made, has reasonable cause to believe that debtor is insolvent.

Sections 67 and 70, of the Bankruptcy Act (cited supra) *do not* require a creditor have "reasonable cause to believe that debtor is insolvent". Only Section 60 requires this (*3 Collier on Bankruptcy* (14th Ed.), Section 60.01).

"A transfer may be both preferential (under Section 60) and fraudulent in nature (under Sections 67 d and 70 e)" (3 *Collier on Bankruptcy* (14th Ed., Section 60.03, p. 763); and "the fact that a transaction is not preferential under the Act does not mean that the transaction may not be considered fraudulent" (*3 Collier on Bankruptcy* (14th Ed.), Section 60.03, pp. 765, 766).

In its opinion page 17 (Vol. III, Tr. 77, Appendix A, p. A17), the Court of Appeals says: "The Trustee has

the burden of proving a voidable preference by a preponderance of the evidence". The modus operandi for carrying the aforesaid burden of proof is discussed and set out in *3 Collier on Bankruptcy* (14th Ed.), Section 23.10, pp. 561 (2), 562, where the author says "It should be borne in mind at the outset that the burden of proof in a turn-over proceeding is at all times on the receiver or trustee; he must at least establish a *prima facie* case. After that, the burden of explaining or going forward shifts to the other party, but the ultimate burden or risk of persuasion is upon the receiver or trustee".

In *Sheinman* v. *Chalmers*, 33 F.2d 902, 904 (2) (C.A. 3), the court considered the burden of proof modus operandi and in ruling stated:

> "Thereupon, the bankrupt, on this appeal entered into the familiar mist which arises from and surrounds the expression 'the burden of proof never shifts'. We shall not try to dispel it beyond saying that it is true the burden of proof never shifts from the party having the affirmative of an issue. *There it rests, at least, until he has made out a prima facie case. Then the burden, not of proving the proponent's case but of explaining or rebutting it, shifts to the other party. This burden he may assume or ignore as he may wish, but he will suffer the consequences of not taking it up and carrying it.* (Citing.)
>
> What the Referee plainly meant by the words 'the burden shifts' was that the trustee has proved his case against the bankrupt and it would stand, unless the bankrupt should assume the burden of explaining or contradicting it. Failing in that, the trustee's proof would stand uncontradicted."

Another element of a preference under Section 60 a of said Act is the requirement that said preference must enable the creditor to obtain "a greater percentage of his

debt *than some other of the same class.*" At page 23 of its opinion the Court of Appeals says: "The purpose of the law of preferences is to secure an equal distribution of the bankrupt's assets *among his creditors of like class.* If a transaction does not interfere with this purpose it does not constitute a voidable preference", and again referring to the payment of the May, 1959 loans (at p. 26 of the Opinion) it continues, thus: "As these transactions do not interfere with an equal distribution of the bankrupt's assets among creditors of appellant's class, we believe the repayment of the $12,000.00 May loan did not result in a preference to the bank as it precipitated new assets flowing to the bankrupt in excess of the amount of payments." (Vol. III, Tr. 83, 85, 86, Appendix A, pp. A23, A26).

The opinion raised the question of "equal distribution" to creditors of the *same class.* When bankruptcy resulted, Appellant had received $25,000.00 taken from his general estate in payment of two unfiled mortgages absolutely fraudulent and void under Sections 67 and 70 of the Act without regard as to whether it had reasonable cause to believe bankrupt was insolvent (discussed infra) which were antecedent debts. The determination of "equal distribution" and of "same class" is not when appellant was paid the $25,000.00 but by the effect of such payment when bankruptcy results. At that time creditors were deprived of and could not participate in the $25,000.00 which paid appellant's said mortgage in full.

The Supreme Court of the United States settled the question as to whether the advantage (preference) over other creditors of the same class was as of the date of the transaction or on such as might eventuate in the subsequent bankruptcy, in *Palmer Clay Products Co.* v. *Brown,* 297 U.S., 227, 80 L.Ed. 655, 56 S.Ct. 450, 451, where it is ruled:

"Whether a creditor has received a preference is to be determined not by what the situation would have been if the debtor's assets had been liquidated and distributed among his creditors at the time the alleged preferential payment was made, but by the actual effect of the payment as determined when bankruptcy results.

We may not assume that Congress intended to disregard the actual result, and to introduce the impractical rule of requiring the determination, as of the date of each payment, of the hypothetical question: What would have been the financial result if the assets had then been liquidated and the proceeds distributed among their creditors?"

The question as to who are creditors of the same class has been ruled by the leading case of *Swartz* v. *Fourth Nat. Bank,* 117 F. 1, 6, 7 (C.A. 8 (Sanborn J.)) thus:

"While it is true that the bankrupt act does not define the word 'class', nor in terms state what creditors are in the same class, it creates classes and specifies others, and it would seem to us that the meaning of the word 'class' in the act should, if possible, be derived from the statute itself. Section 64, 11 U.S.C.A. Sec. 104, after directing the payment of certain expenses of administration, creates three classes of creditors—parties to whom taxes are owing, employees holding claims for certain wages, and those who by laws of the states or of the United States are entitled to priority. Sections 56 (b), 57 (e), and 57 (h), 11 U.S.C.A. Secs. 92, 93, provide for the treatment and disposition of claims secured by property, and of claims which have priority. The creditors who hold these various claims, and the general creditors of the estate, constitute the classes of creditors of which the bankrupt act treats. Now, if any one of these various classes is taken by itself and examined, it will be seen that each of the creditors in the same class always receives the same per-

centage upon his claim, out of the estate of the bankrupt, that every other creditor of his class receives. Where the estate is insufficient to pay claims of different classes in full, the classes receive out of the bankrupt estate, different percentages of their claims, but creditors of the same class receive the same percentage. The test of classification is the percentage paid upon the claims out of the estate of the bankrupts."

Following Judge Sanborn's opinion is *In re Star Spring Bed Co.*, 257 Fed. 176, 180 (D.C.N.J.) in which the court ruled:

"Judge Sanborn of the Circuit Court of Appeals of the Eighth Circuit, in a very clear and well-reasoned opinion reached a different conclusion in the case of Swartz v. Fourth Nat. Bank, 117 Fed. 1, 8 A.B.R. 673. He holds that secured and unsecured creditors are in the same class within the meaning of the act and in this he is followed by the Circuit Court of Appeals of the Sixth Circuit in the case of Livingston v. Heineman, 120 Fed. 786, 10 A.B.R. 39. The act itself does not define the word 'class' nor state in terms what creditors are in the same or different classes. It creates and specifies classes and from a study of these it may be possible to arrive at a definition of the word 'class' within the meaning of the act. Section 64 specifies three classes—parties to whom taxes are owing, employees holding claims for certain wages, and those who by the laws of the states or of the United States, are entitled to priority. There are also general creditors. The three classes above mentioned have priority over general creditors. There are broadly speaking, two classes of creditors—those who have priority and are paid in full and general creditors, including secured and unsecured. These are the classes of creditors of which the Bankruptcy Act treats.

* * *

I agree with the conclusion of Judge Sanborn that within the meaning of the Bankrupt Act, the test of

classification is the percentage paid upon the claim out of the estate of the bankrupt, and that secured and unsecured creditors are in the same class."

At page 16 of its opinion, the Court of Appeals justifies the June 30, 1959, set off of $9,733.88 against the indebtedness owed the bank. At page 4 thereof, it says that appellant applied said set-off to the June 3, 1959 loan (Vol. III, Tr. 64, 76, Appendix A, pp. A4, A16). The justification is under Section 68 (a) of the Act (11 U.S.C.A. Sec. 108) and is said to be proper "*in the absence of fraud or collusion between the bank (appellant) and the bankrupt*". The error at bar is that the Court of Appeals, disregards the fact that appellant and bankrupt practiced fraud by keeping the May and June 1959 mortgage loans unfiled and secret from creditors and thus there was fraud and collusion between appellant and the bankrupt and appellant cannot reap benefit from the fraud in which it actively participated under Section 68 of the Act and the cases cited by the Court of Appeals regardless of appellant's intent.

That fraud or collusion existing between bankrupt and appellant will destroy the right of set off under said Section 68 (a) is determined by *New York County Nat. Bank* v. *Massey*, 192 U.S. 138, 24 S. Ct. 199, 48 L. Ed. 380.

The May and June, 1959 mortgage loans instruments each carry the notation "This note was not filed. We held car titles." (Vol. I, Tr. 32, 35); appellant's president Finks testified that said mortgage was not filed because appellant felt it had ample security in its November, 1957 mortgage loan (Vol. I, Tr. 62); bankrupt testified that he knew said mortgages were not filed (Vol. I, Tr. 52), thus said mortgages were purposely not filed and purposely kept secret from the creditors by agreement of the parties thereto. The Missouri Supreme Court ruled this situation in

State to Use of Mayer v. *O'Neill, et al.*, 151 Mo. 67, 52 S.W. 240, 246, where it said:

> (246) "An agreement existed between the bank and Johns that the mortgage to the bank should not be put to record, because doing this would injure Johns' credit. Such an agreement is fraudulent in fact." (Italics furnished).

At page 246 the Supreme Court continues:

> "As is pertinently observed by Richardson, J., in Reed v. Pelletier, 28 Mo. 173: 'The term "fraud" as understood in the statute concerning fraudulent conveyances has the same meaning in the attachment law, and it is not necessary to show the act originated in any meditated design to commit a positive fraud or to injure other persons. There are many acts, not the result of intentional fraud, which the law, nevertheless, from their tendency to deceive other persons, or from their injurious consequences to the public, prohibits as being within the same reason and mischief as actual fraud.'"

The court in the *O'Neill* case, cited supra, l.c. 246, discussing the effect of mortgagee taking possession where said mortgages are fraudulent and ruled thus:

> "But, as has been expressly decided, such taking possession will not nullify or neutralize an actual fraud, such as that perpetrated between the bank and Johns in concealing by agreement the mortgage between them * * * *Existing such fraud, even to a portion of the indebtedness, it will taint the whole transaction.*" (Italics furnished).

When on June 30, 1959, appellant set off $9,733.88 against bankrupt's bank account and applied the same as a payment on bankrupt's June 3, 1959 $16,000.00 mortgage loan and on the night of the same day bankrupt voluntarily gave appellant a $6,266.12 mortgage on fifteen of his

free and clear used cars, post-dated July 1, 1959, filed July 2, 1959, for no money to help appellant protect the balance due on said June, 1959 loan (Vol. I, Tr. 39, 40) and thereafter on July 4, a holiday, or July 5, Sunday (Opinion p. 20, Vol. III, Tr. 80, Appendix A, p. A20) and at night, between five or six P. M. and midnight, bankrupt permitted appellant to enter and remove said fifteen free and clear used cars from his premises (Vol. I, Tr. 56), it is apparent such subsequent close collaboration, conduct and behavior between appellant and bankrupt characterizes and reflects a fraudent animus which goes back to and prompted the transactions beginning the making of said May and June, 1959 mortgages, continuing through said set-off and gives tone to an original fraudulent purpose with respect to such transactions.

In *State to Use of Mayer* v. *O'Neill, et al.*, cited supra, at page 247, the Missouri Supreme Court discusses the effect of such agreements subsequent in point of time, and makes the following observation applicable at bar:

> "This agreement, though subsequent in point of time to the drafting of the mortgage and the taking of possession of the goods as per notice, *gives a clear insight of the animus which prompted the action of the bank and Mrs. Mayer in the whole transaction,* which was to 'hinder and delay or defraud' the creditors of Johns. *Subsequent acts of the parties are admissible evidence, when calculated to explain the motives which actuated them in the beginning, and thus give tone to the original fraudulent purpose.* But the debt to the bank being fraudulent, as already stated, it is sufficient to defeat the action of plaintiff that Young undertook the task of bolstering up the claim of the bank in the manner as above related, to the intended or resultant prejudice of Johns' creditors."

In support of the O'Neill case is *Central Nat. Bank* v. *Doran et al.*, 109 Mo. 40, 18 S.W. 836; *Sauer* v. *Behr*, 49

Mo. App. 86; *Williams* v. *Kirk*, 68 Mo. App. 457, and *Keet & Rountree Dry Goods Company* v. *Brown et al.*, 73 Mo. App. 245.

The Court of Appeals mentions that bankrupt gave appellant a financial statement as of March 31, 1959, showing a net worth of $113,713.06 (Opinion, pp. 3, 11, 21, Vol. III, Tr. 63, 71, 81, Appendix A, pp. A3, A11, A21). Part of the evidence, common to the four turn-over proceedings, shows that bankrupt was hopelessly insolvent then and during all of his transactions with appellant. As of December 31, 1957, he was insolvent by $37,990.10; as of December 3, 1958, he was insolvent by $126,933.73; and as of May 31, 1959 (approximately six weeks prior to bankruptcy) he was insolvent by $149,072.73 (Vol. II, Tr. 39, Par. 1); another part of such common evidence shows that bankrupt's liabilities ($273,000.00) exceeded his assets ($163,000.00) by $120,000.00 (C.C.C. Supp. Stip., page 42, filed March 17, 1966).

Notwithstanding such actual insolvency, the circumstances surrounding the making of the May and June, 1959, mortgage loans, stated supra and the agreement not to file such mortgages and thus keep their existence secret from creditors and appellant's collecting payment thereof without the knowledge of bankrupt's creditors, point squarely to the answer that appellant *had* the "reasonable cause" required by Section 60 (b) of the act or at least was put upon inquiry and was bound by what it could have discovered. *C. W. Swanson et al.* v. *Wylie*, 237 F.2d 16, 19 [par. 4] (C.A. 9) This is especially true since appellant actually and actively participated in creating the instant fraud on creditors by failing to file said mortgages pursuant to its understanding with bankrupt. In addition the record is replete with evidence that appellant was informed and was being kept informed of bankrupt's pursuit for a

capital loan made necessary by a *lot* of expansion and *over* expansion, detailed in paragraphs 7, 8, 11, 12, 13, 14 of the Statement, supra. This also gave appellant said "reasonable cause".

In *Smyth* v. *Kaufman*, 114 F.2d 40, 41 (C.A. 2) the debtor told the executors of the creditor's estate that "it was hard pressed for cash" and gave them assurance that it was "working on quite a number of new deals for capital" (as in the case at bar). Thereafter bankrupt made two $500.00 payments to said executors which the trustee sued to recover as preferences (as at bar). The District Court found that said executors had "reasonable cause" to believe bankrupt was insolvent based on the aforementioned statements to them and that the effect of such payments was to enable the executors to obtain a greater percentage than other creditors of the same class and held that said payments were recoverable preference (as at bar). On appeal, the Court of Appeals concluded (l.c. 41) "there was much evidence to inform executors that bankrupt was in financial difficulties" and ruled:

> "It cannot be said that there was not evidence to support the finding of the trial court that the executors had reasonable cause to believe that Kapik (bankrupt) was insolvent."

This should have been the Court of Appeals' ruling at bar.

Lastly, in its opinion at page 23 (Vol. III, Tr. 83, Appendix A, p. A23), the Court of Appeals refers to and grants appellant the right of set off under Section 60 c of the Act and states that said "statute itself allows an offset against the recovery of a preference". It then proceeds with an erroneous mathematical calculation showing that bankrupt's estate was actually enriched by the fraudulent

manipulations incident to the May and June 1959 unfiled chattel mortgages which were paid to appellant. The Court of Appeals disregards the fact that said section is not applicable at bar for the following reason:

1. The May and June 1959 loans were secured by mortgages which the Court of Appeals ruled were void. (Opinion p. 16, Vol. III, Tr. 76, Appendix A, p. A16). Section 60(c) provides that "If a creditor has been preferred, and afterwards *in good faith* gives a debtor credits *without security of any kind*" *then* the amount of such new credit remaining unpaid at the time of bankruptcy may be set off against the amount which would otherwise be recoverable from him".

The Court of Appeals misapplied Section 60 c in that (a) the credit extended by appellant was under a fraudulent transaction declared so by the Referee, affirmed by the District Court and found so by the Court of Appeals, and thus the credit extended by appellant cannot be in "good faith" as required by said section: the "good faith" mentioned in Section 60(c) cannot spring from transfers void and fraudulent as to creditors; (b) the credit extended by appellant was not without security of *any kind* but was *with* security, namely, the May and June 1959 chattel mortgages.

2. The Court of Appeals erred in its mathematics showing that bankrupt's estate was enriched when under *National City Bank of New York* v. *Hotchkiss*, cited and quoted supra; the United States Supreme Court held (as the Court of Appeals here also found) that the said loans having passed into bankrupt's general checking bank account, said funds became part of bankrupt's general estate and payment therefrom of said fraudulent and void May and June unfiled mortgages depleted instead of enriching

bankrupt's general estate to the detriment of creditors of the same class.

Section 60c not being applicable the Court of Appeals erred in allowing said fraudulent and void May and June 1959 chattel mortgage loans to be used as offsets against the recoverable $12,000.00 and $13,000.00 preferential payments which appellant received.

The Court of Appeals also erred in ruling that said payments to appellant totalling $25,000.00 made on the eve of bankruptcy were not voidable, preferences recoverable by the trustee but, arguendo, if they were, it erred nevertheless in disregarding the trustee's right to recover said payments under Sections 67 and 70 of the Bankruptcy Act as fraudulent and void transfers under said sections and also under Section 443.460 of *Vernon's Annotated Missouri Statutes.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

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October, 1967